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Date: * 05/04/2022

Letter of Protest
Docket No. 2022-84-WS

Protestant Information:

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1. What is your connection or interest in this case? * For example, are you a customer of the Company that is the subject of this pending proceeding? (This section must be completed. Attach additional information if necessary.)

The Utility Management & Conservation Association ("UMCA") is a national trade association promoting energy conservation and tenant utility consumption accountability by supporting sub-metering, billing, and utility expense management programs for electricity, gas, trash, water, and sewer services. UMCA has over 40 members who provide utility expense management and billing services to multi-family property owners and condominium associations, many of which operate in South Carolina. The UMCA is an interested party in this docket and welcomes the opportunity to distinguish its members' business practices from the Respondent in this Docket No. 2022-87-WS. (Additional information attached).

2. Please give a concise statement of your protest. * (This section must be completed. Attach additional information if necessary.)

Please see attached "UMCA'S LETTER OF PROTEST IN OPPOSITION TO COMPLAINANTS".

3. Do you wish to make an appearance at a hearing in this proceeding , if scheduled, and offer sworn testimony? *

Yes, the UMCA wishes to make an appearance at a hearing through one of its members.

Signature Required:

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

IN RE:)
SARAH ZITO; ALVARO SARMIENTO,)
JR.; MARK SHINN; AND DANIEL)
BERMUDEZ,)
Complainants,)
v.)
STRATA AUDUBON, LLC AND)
STRATA VERIDIAN, LLC,)
Defendants.)

DOCKET NO. 2022-84-WS

UMCA'S LETTER OF PROTEST IN OPPOSITION TO COMPLAINANTS

Pursuant to S.C. Code Ann. Regs. 103-827(A), the Utility Management & Conservation Association (“UMCA”) hereby submits this Letter of Protest as intended to advise the Public Service Commission of South Carolina (“Commission”) and all parties to a proceeding before the Commission of the fact and character of the UMCA’s objection to part or all of the subject matter of the proceeding.

I. Background

The UMCA is a national trade association promoting energy conservation and tenant utility consumption accountability by supporting sub-metering, billing, and utility expense management programs for electricity, gas, trash, water, and sewer services. UMCA has over 40 members who provide utility expense management and billing services to multi-family property owners and condominium associations, many of which operate in South Carolina. The UMCA is an interested party in this docket and welcomes the opportunity to distinguish its members' business practices from the Respondent in this Docket No. 2022-87-WS, whose activities prompted the Complainants

to file the Complaint alleging unlawful practices related to the tenant billing of water and sewer services.¹

The allegations brought forth by the Complainants claim that (a) the lack of actual measurement of water and sewer through the use of a submeter, (b) the use of rates assessed to tenants that differ from the rates charged by a utility provider to a landlord and/or property owner, and (c) assessment of administrative fees for water and sewer allocation rates, subject a landlord and/or property owner to the jurisdiction and regulation of the Commission by meeting the statutory definition of a “public utility”, as defined under S.C. Code Ann. Section 58-5-10 (3), as an entity or person furnishing or supplying water, sewerage collection, and sewerage disposal to the public for compensation. The UMCA presents its arguments as follows to provide the Commission with a distinction of the common practices of water and sewer allocation billing by the UMCA members from the allegations brought forth by the Complainant as a means to request the Commission include such distinction in its final Order to ensure that no prohibition, nor inclusion within the definition of “public utility”, of the common practice of water and sewer allocation tenant billing is inferred by incident of the Commission’s Order.

II. Arguments

A. Explanation of Water and Sewer Allocation Methodology

A utility allocation method, also known as Ratio Utility Billing System (“RUBS”), is an alternative method of tenant billing of utilities, in contrast to sub-metering (a method used to measure actual utility usage), as a means of recovering the utility expense billed by the utility provider to a landlord for usage consumed by tenants. RUBS is a common practice used by

¹ UMCA is the successor to NSUAA. NSUAA’s testimony was favorably cited and relied upon by the Commission in Docket No. 2001-485-W/S, Order No. 2003-214, *In Re: Rule to Show Cause on Submeters*, where the Commission ruled that the activities of measuring water usage by use of submeters and the provision of related utility billing functions did not make submeterers “public utilities” for purposes of regulation by the Commission.

property owners nationwide that divides the utility expense proportionally between the tenants based on a mutually agreed-upon formula. Commonly used and regulated in many jurisdictions, such as Arizona², Indiana³, Texas⁴, Virginia⁵, along with several others, RUBS provides an equitable method for a landlord to recover its utility expense, while also promoting conservation through the transparency of utility costs billed directly to tenants in lieu of inclusion within rent. These jurisdictions expressly include methods most commonly used as a form of RUBS to include (1) by number of tenants, (2) by livable square footage, (3) by unit or bedroom type, (4) by proportionate sub-metered hot water use, or (5) any other fair allocation of charges as provided within the terms of the lease agreement. Such methods have been utilized in these jurisdictions for many years without any violation of consumer protection laws or public utility regulations, while also significantly contributing towards water conservation. A 1999 study conducted by Industrial Economics of Cambridge, Massachusetts, analyzed water billing practices at properties in Texas, Florida, and California that had implemented RUBS and discovered that RUBS properties used between 6 and 27 percent less water than properties that included water costs within the rent.⁶ These findings seem logical as tenants are less likely to allow a running toilet or dripping faucet if they know they must pay for it. Accordingly, a shift in Commission policy that discourages RUBS will result in waste which depletes the state's limited natural resources and increased occupancy costs for affected tenants.

Due to the nature of utilities and outdated building infrastructure, RUBS is the most cost-efficient utility allocation mechanism for many buildings that lack a preexisting sub-meter

² Arizona Revised Statutes §33-1314.01(F).

³ 170 Indiana Administrative Code §15-2-2(a)(1)(B).

⁴ Public Utility Commission of Texas Subst. R. §24.281(e).

⁵ Code of Virginia §55.1-1212(D).

⁶ Koplow, D. and A. Lownie. 1999. "Submetering, RUBS, and Water Conservation". Industrial Economics, Inc. Cambridge, MA.

infrastructure.⁷ In such buildings, the addition of sub-meters is often cost-prohibitive, or simply infeasible. The use of RUBS does not provide a means for a landlord to profit from its utility billing to tenants, but simply a means of reimbursement of utility costs borne by tenants, yet assessed against landlords. In Commission Orders 2003-214 (Docket No. 2001-485-W/S) and 2008-725 (Docket No. 2008-192-W/S), the Commission determined that submetering does “not meet the statutory definition of a ‘public utility’” as “submeters do not actually ‘furnish or supply’ the commodity, but merely measure the amount of flow”; by extension, RUBS, as a measuring method would also not be considered to be furnishing or supplying the commodity that would subject a landlord to status as a ‘public utility.’⁸ In sum, RUBS, even with the absence of measurement of actual use, is not a method that would cause an entity or person to meet the definition of a “public utility” as defined under S.C. Code Ann. Section 58-5-10 (3) (Supp. 2002).

B. Calculation of Rates Using the Occupancy Method

The most commonly used rate calculation method for RUBS is to take the utility provider bill that is sent to the landlord, subtract any late penalties, deposits, disconnect or reconnect fees, and any applicable common area deductions, and divide the remainder by the selected RUBS method and the number of days in the usage cycle to determine a per day consumption rate. Using the per tenant, or as most commonly known as the “occupancy method”, the landlord takes the utility provider bill, less any penalties and common area deductions, and divides the remaining amount by the total number of occupants in the apartment building to determine a per occupant rate. This method provides the landlord the ability to equitably distribute the utility cost based on the number of occupants in each unit. While the per occupant rate will not equal the utility

⁷ HUD.Loans. 2022, “RUBS: Ratio Utility Billing System”, <https://www.hud.loans/hud-loans-blog/2022/1/26/rubs-ratio-utility-billing-system>.

⁸ *In Re: Rule to Show Cause on Submeters*, Docket No. 2001-485-W/S, Order No. 2003-214, Public Service Commission of South Carolina, April 15, 2003 and *In re: Petition for a Declaratory Order*, Docket No. 2008-192-W/S, Public Service Commission of South Carolina, October 28, 2008.

provider's posted rate schedule, as the latter is a rate per gallon and not a rate per occupant, this method nevertheless ensures that the total billed to the occupants does not exceed the total billed by the utility provider, thus allowing reimbursement while avoiding compensation in excess of the utility provider bill.

C. Use of Occupancy Method is Reasonable

As mentioned above, several states, and even some cities and counties, have enacted laws and regulations permitting RUBS as a means for a landlord to recover its utility expense, and such laws and regulations expressly include the occupancy method that forms the basis of this Complaint. Montgomery County Department of Housing and Community Affairs ("MCDHCA") plainly states that "RUBS provides a comprehensive regulatory system to assure that practices used by landlords to allocate water and sewer (wastewater) costs to tenants are just and reasonable."⁹ MCDHCA went even further on to provide formulas to use for RUBS, to include the occupancy method as its #1 formula.¹⁰ The Public Utility Commission of Texas provides the same within its Tenant Guide and lists the first option for calculating tenant water and sewer by an allocation method by use of the occupancy method.¹¹ Even more so, Indiana's Administrative Code clearly states that reasonable allocations may be based on an estimated volume of water distributed to each tenant.¹²

Given that the occupancy method has been deemed reasonable by several state and local legislative officials, the Complainants' argument that such method is unjust and unreasonable based simply on the absence of meters measuring actual usage is without merit. The long-standing practice of using the actual charges billed by the utility provider to the landlord and passing such

⁹ Montgomery County Department of Housing and Community Affairs, February 2017, "*Multi-Family Apartment Complex Ratio Utility Billing System*," https://montgomerycountymd.gov/DHCA/Resources/Files/housing/licensing/form_rubs_survey_update.pdf

¹⁰ *Id.*

¹¹ Public Utility Commission of Texas, "*Utili-Facts – Allocated utility Service for Property Owners*," <https://www.puc.texas.gov/consumer/facts/factsheets/waterfacts/TenantGuideAllocatedService.pdf>

¹² 170 Indiana Administrative Code §15-2-2(a)(1)(B).

costs along to the tenants in an equitable manner, such as the occupancy RUBS method, provides more transparency to tenants as to their actual utility costs than inclusion of utilities within rent. Utility-inclusive rent offers no clear guidelines as to the determination of tenants' utility use and could be greatly exceeding the actual utility costs billed by the utility provider to the landlord. The Complainants are asking for an order well outside the Commission's jurisdiction by requesting it to adjudicate issues relating to contract law, the Residential Landlord Tenant Act, and common law negligence claims.

D. Administrative Fees Do Not Automatically Classify a Landlord as a "Public Utility"

Similar to the practice of RUBS, assessment of administrative fees as part of the utility billing expense recovery by landlords has been a common practice for years. As with any provision of service to tenants, a cost is borne by the landlord to provide tenant utility billing and the practice of passing such costs on to the tenants in lieu of increasing base rent should not cause a landlord to become a "public utility". As summarized by the Commission in Docket No. 2001-485-W/S, *In Re: Rule to Show Cause on Submeters*, the activities of landlords passing through utility costs and providing billing functions to its tenants do not cause such landlords to be classified as "public utilities" for purposes of regulation by the Commission.¹³ Administrative fees combined with utility costs billed to tenants using the RUBS method that do not exceed the total utility provider bill as billed directly to the landlord by the utility provider do not violate the law or any Commission rules. In the multiple jurisdictions mentioned hereinabove, tenants may request that landlords provide copies of the utility provider bills, along with an explanation of the RUBS method used, to give the tenant the ability to confirm that the total billed to the tenants did not exceed costs billed directly to the landlord.¹⁴ This requirement allows a tenant to confirm the

¹³ *In Re: Rule to Show Cause on Submeters*, Docket No. 2001-485-W/S, Order No. 2003-214, Public Service Commission of South Carolina, April 15, 2003.

¹⁴ Public Utility Commission of Texas Subst. R. §24.277(e); Code of Virginia §55.1-1212(E); MD County Code §29.00.01.05.

accuracy of the landlord's utility billing and provides confirmation that the landlord does not provide utility service for compensation.

III. Conclusion

Pursuant to the Commission's past rulings, landlords whom pass through utility costs to its tenants without compensation do not fall within the definition of a "public utility" and thereby are not subject to the jurisdiction of the Commission.¹⁵ The Commission has stated further that the activities of measuring the commodity and providing billing functions do not cause an entity to fall within the definition of a "public utility", and therefore, in the same, would not cause an entity that is merely allocating the commodity to fall within such definition.¹⁶ If the Commission adopts a policy classifying an entity using RUBS as a "public utility", South Carolina may see an increase in overall rental housing costs. Following the significant financial impact to landlords who must now pay for utilities out of pocket, landlords will most likely need to be increase rent to offset this cost. The increase could be significant as landlords will need to factor in future rate increases and the expected jump in usage as tenants fail to conserve. In short, by setting a policy to cause an entity that neither furnishes or supplies a commodity, nor receives compensation for such act, to subject itself to significant and costly regulations by the Commission if deemed a "public utility", the Commission may inadvertently contribute to a decrease in affordable housing and an increase in water and sewer usage.

If the Commission seeks to address possible consumer protection issues in this matter should the facts prove the Respondent did receive compensation for its acts against the Complainants, we respectfully ask the Commission to distinguish in its Order the practices of landlords utilizing RUBS without compensation as activities that do not fall within the definition

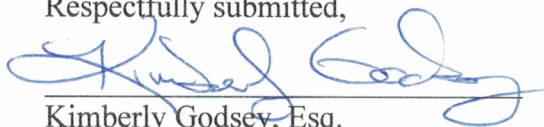
¹⁵ *In re: Petition for a Declaratory Order*, Docket No. 2008-192-W/S, Public Service Commission of South Carolina, October 28, 2008.

¹⁶ *Id.*

of a “public utility” for purposes of regulation by the Commission. Should the Commission schedule a hearing in this matter, the UMCA wishes to make an appearance and offer sworn testimony.

Dated: May 04, 2022

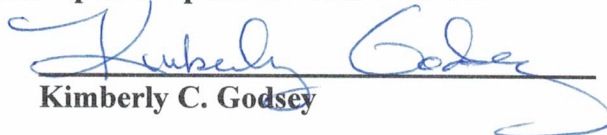
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 4th day of May, 2022, a true and correct copy of the foregoing document was served by electronic mail upon the persons named below.


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